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Supreme Court of the United States

NATIONAL REPUBLICAN SENATORIAL COMMITTEE *et al.*,

Petitioners,

v.

CHARLOTTE PRITT,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether summary reversal is warranted in this "public figure" defamation action, challenging political advertisements run during the 1996 West Virginia gubernatorial campaign, when the West Virginia Supreme Court of Appeals ordered a plenary trial—

(1) Ignoring this Court's precedent, which required an independent review of the record on which the trial court concluded that there was no clear and convincing evidence of actual malice, and when

(2) The requisite independent review confirms the trial court's conclusion that there was nothing in the record to establish the constitutionally required clear and convincing evidence of actual malice.

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the West Virginia Supreme Court: Charlotte Jean Pritt, the Republican National Committee, the National Republican Senatorial Committee, and the West Virginia State Victory Committee.*

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* The Republican National Committee has also filed a Petition for Writ of Certiorari.

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PETITION FOR A WRIT OF CERTIORARI

Respondent Charlotte Pritt, a former member of the West Virginia legislature, was the Democratic Party candidate in the 1996 West Virginia gubernatorial election, won by Republican Cecil Underwood. Alleging that Petitioners' advertisements—critical of her legislative voting record—caused her to lose the election, Respondent brought suit for defamation in West Virginia state court. The advertisements were based exclusively on Respondent's legislative voting record, and were created for Petitioners by a non-party to this lawsuit. Before sponsoring the advertisements, Petitioners confirmed their factual accuracy based on their own review of Respondent's legislative record. Concluding, *inter alia*, that "there is *no record evidence* that [Petitioners] acted with 'actual malice,'" Pet. App. 27a (emphasis added), the Circuit Court of Fayette County granted Petitioners' motion for summary judgment. Reversing, the West Virginia Supreme Court of Appeals ("West Virginia Supreme Court") perceived a "factual dispute" solely because "the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice." Pet. App. 15a.

On this basis alone, the West Virginia Supreme Court required that a jury decide whether political speech during a heated campaign should subject Petitioners to a sizeable money judgment. Jettisoning this Court's constitutionally-mandated screen for insubstantial defamation cases—*i.e.*, an independent search for clear and convincing evidence of actual malice—the West Virginia Supreme Court inevitably chilled the prospect for robust political campaign debate. Consequently, Petitioners respectfully request that a writ of certiorari issue and that the judgment of the West Virginia Supreme Court be summarily reversed.

This Court's precedents unambiguously impose on appellate courts a constitutional obligation to independently review the record to determine, as a matter of law, whether a public figure defamation plaintiff has presented clear and convincing evidence of actual malice. It is well settled in the federal Circuit Courts of Appeals that the rule of independent review applies in appeals from a grant of summary judgment. The West Virginia Supreme Court simply cast aside the constitutional rule of independent review, beginning and ending its "review of the record" with the observation—doubtlessly true in *all* public figure defamation cases—that the parties "repeatedly and continuously have argued the facts" regarding actual malice. The court, however, did not identify even a *single fact*, let alone clear and convincing evidence, from which a jury could find that Petitioners acted with actual malice.

The West Virginia Supreme Court's decision has far-reaching and constitutionally impermissible consequences for electoral candidates of all political parties, and for their supporters. The rule of independent review and the actual malice requirement are designed to give freedom of expression sufficient "breathing space" by diminishing "the pall of fear and timidity" created by the threat of a civil money judgment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72, 277-78 (1964). The West Virginia Supreme Court has choked off that breathing space by lowering—to the point of extinction—the constitutional hurdles of independent review, and the clear and convincing evidence standard. Because the West Virginia Supreme Court's decision cannot be squared with the precedents of this Court and the federal Circuit Courts of Appeals, summary reversal is warranted.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court (Pet. App. 1a-23a) is reported at 557 S.E.2d 853. The order

of the Circuit Court of Fayette County, West Virginia granting summary judgment to Petitioners (Pet. App. 24a-28a) is not reported.

JURISDICTION

The judgment of the West Virginia Supreme Court reversing the trial court's grant of summary judgment was entered on December 12, 2001, Pet. App. 1a, and therefore this petition is timely filed. Sup Ct. R. 13(1). This Court has jurisdiction over that judgment pursuant to 28 U.S.C. § 1257(a). Although the West Virginia Supreme Court remanded this case for further proceedings in the trial court (*i.e.*, a trial), the court's judgment is nevertheless "final" within the meaning of 28 U.S.C. § 1257(a). First, the West Virginia Supreme Court's decision is not subject to further review in the West Virginia courts. Second, because each of Respondent's causes of action[1] is based upon the very same advertisements as her defamation claim, the trial court ruled, and the West Virginia Supreme Court implicitly accepted, that each of the causes of action is subject to the actual malice requirement. *See, e.g.*, Pet. App. 17a-18a, 26a. Thus, correcting the West Virginia Supreme Court's erroneous application of the constitutional rules of independent review and proof of actual malice by clear and convincing evidence will terminate this action. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 612 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80, 485, 486-87 n.13 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974).

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[1] Respondent asserted causes of action for: defamation (Count I); violation of W. Va. Code § 3-8-11(c) (Count II), which imposes criminal penalties for publishing falsehoods about a candidate for public office; defamation *per se* (Count III); and, "false light" invasion of privacy (Count IV).

Moreover, review of the West Virginia Supreme Court's judgment is necessary to prevent a significant erosion of federal policy. *Cox Broadcasting*, 420 U.S. at 482-83. This case raises the important question of whether statements made in a campaign advertisement during a heated political campaign are entitled to First Amendment protection. It is axiomatic that speech during political campaigns is "an area of the most fundamental First Amendment activities," *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976), and that "[a]djudicating the proper scope of First Amendment protections has often been recognized . . . as a 'federal policy' that merits an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend I. The First Amendment applies to the States through the Fourteenth Amendment, which provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

STATEMENT OF THE CASE

Respondent's Status as a Public Figure

Respondent necessarily conceded in the proceedings below that she is a "public figure" for purposes of this defamation action. *See* App. Br., at 19. Respondent had been in the West Virginia legislature for eight years and had campaigned in ten elections for public office, including a failed run for governor of West Virginia in 1992. *See* Am. Compl. ¶¶ 4-5; Pritt Depo., Vol. I, at 59-60.

The Allegedly Defamatory Campaign Advertisements

In 1996, Respondent received the Democratic nomination for Governor of West Virginia and faced Republican Cecil Underwood in the general election.[2] Respondent ran a series of negative advertisements against Underwood, accusing him of dodging the draft during World War II, voting against the creation of Medicare during his first term as Governor in 1960, and proposing a 20% reduction in the state police force. *See* Pritt Depo., Vol. I, at 273-81, 290-95, 307-08. According to Underwood, these allegations were false. *See* Underwood Depo., at 14-24.

Between October 24 and Election Day, Petitioners paid for and sponsored the following radio advertisement

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[2] The 1996 Democratic primary proved to be a bitter contest between Respondent and State Senator Joseph Manchin, with both candidates running negative campaign advertisements against the other. *See* Pritt Depo., Vol I, at 163; Pritt Depo., Vol. III, at 115. Respondent aired advertisements accusing Senator Manchin of accepting bribes, consorting with convicted felons, and brokering legislative deals for his own financial gain at the expense of West Virginia coal mining jobs. *See* Pritt Depo., Vol. I, at 163-64, 173-74, 195-96. For his part, Senator Manchin criticized Respondent's legislative voting record, including her proposal to teach sex education to six-year-olds; her vote against banning the sale of "X-rated" videos to children; her vote to allow drug abusers to work in the public schools; her vote against honoring West Virginia's Gulf War veterans; her vote to allow the burning of the American flag; and, her vote against requiring students to recite the Pledge of Allegiance at school. *See* Pritt Depo., Vol. I, at 229-34, 242-51. The advertisements at issue in this case are substantially the same as those sponsored by Senator Manchin. *See* pp. 20-27, *infra*. Respondent did not sue Senator Manchin, a fellow Democrat.

about Respondent's legislative voting record, seven aspects of which she challenged (as noted):[3]

> Behind Charlotte Pritt's campaign smile is a liberal voting record she can't hide from. [1] In the State Senate, Charlotte Pritt proposed teaching first graders about condoms. Surprised? You shouldn't be. [2] Senator Pritt also voted to permit the sale of pornographic videos to children. [3] She even voted to allow convicted drug abusers to work in our public schools. [4] If parents can't trust Charlotte Pritt to protect our children, think also of our veterans. [5] Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War. [6] Senator Pritt voted to allow the burning of the American Flag that all veterans fought so hard to defend. [7] She even opposed requiring students to begin their day with the Pledge of Allegiance. Look behind the smile. Charlotte Pritt—wrong on the issues. Wrong for West Virginia.[4]

There was no dispute in the proceedings below that the statements made in the advertisement were based exclusively upon Respondent's recorded votes on specific bills and amendments introduced in the West Virginia legislature. *See* Welch Depo., at 26-27, 29-30, 40-41, 43-44, 46, 83, 87-88.

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[3] Petitioner NRSC formed the Victory Committee for the purpose of airing campaign advertisements in the 1996 West Virginia gubernatorial election. Petitioner Victory Committee paid for the advertisements with a loan from the NRSC.

[4] A similar television advertisement was aired during the same timeframe. Pet. App. 37a-38a.

Evidence Concerning Petitioners' Alleged Actual Malice

The original draft of the advertisements was created by David Welch, a non-party herein, and a media consultant to Petitioner Victory Committee. *See* Welch Depo., at 25-26, 28-30, 33-34. In drafting the advertisements, Mr. Welch researched and read certain State House and Senate bills and amendments on which Respondent voted. *See id.* at 26-27, 29-30, 40-41, 43-44, 46, 83, 87-88; *see* pp. 20-27, *infra*. Mr. Welch also consulted the Journal of the House of Delegates and the Journal of the Senate, a public record that reported Respondent's vote on the House and Senate bills and amendments. *Id.* Mr. Welch believed that the statements in the advertisement were "[a]bsolutely truthful" and presented a "fair and accurate portrayal of [Respondent's] voting record" on each one of the bills and amendments at issue. *Id.* at 50, 88.

However, as an independent consultant, Mr. Welch did not have the authority on behalf of Petitioners to approve the advertisements for publication. *See* Welch Depo., at 28-33. Instead, he was required to submit drafts of the proposed advertisement to Petitioners for their review and approval. *See id.* at 30-33, 88. Mr. Welch submitted "at least" two drafts of the advertisements to Craig M. Engle, the general counsel of Petitioner NRSC who was the only employee of Petitioners to offer evidence in this case. *See id.* at 32; Engle Aff. ¶ 1. On behalf of Petitioners, Mr. Engle independently reviewed the bills and amendments in support of the draft advertisement to verify that the statements were truthful and accurate. *See* Engle Aff. ¶¶ 1-4(a)-(f). Having completed his independent review, Mr. Engle was satisfied that the advertisements "truthfully portrayed" both the legislation at issue and Respondent's vote on that legislation. *See* Engle Aff. ¶¶ 3, 5. Mr. Engle thereafter approved the advertisement for publication on behalf of Petitioners. *See* Engle Aff. ¶¶ 5-6; Welch Depo., at 33.

Against this record evidence, Respondent nonetheless contended that Petitioners had acted with actual malice. Respondent, however, did not present any evidence that Mr. Welch was aware of any fact that would have put him on notice that the statements in the advertisements were in any way inaccurate or false. Although Mr. Engle was the employee of Petitioners with responsibility for approving the advertisements for publication, Respondent did not take his deposition. Consequently, Respondent presented no evidence contradicting Mr. Engle's affidavit testimony concerning his review of the record, which led to his belief that the advertisements made "truthful and accurate" statements about Respondent's legislative voting record. *See* Engle Aff. ¶¶ 1-5.

Proceedings Below

On October 31, 1997, Respondent filed her original complaint in West Virginia state court, and an amended complaint approximately one year later. In the Amended Complaint, Ms. Pritt alleged, *inter alia*, that the seven statements in the radio advertisement—three of which also appeared in a television advertisement—were defamatory. Respondent sought $2 million in compensatory damages and $10 million in punitive damages. The parties conducted discovery, and Petitioners thereafter moved for summary judgment, arguing that (1) the statements were true, and (2) even if false, there was no clear and convincing evidence that Petitioners made the statements with actual malice. Respondent did not dispute that she was a public figure when the allegedly defamatory statements were made, or that she was required to prove actual malice by clear and convincing evidence.

The Circuit Court of Fayette County granted summary judgment in favor of Petitioners, holding, *inter alia*, that Respondent had not presented clear and convincing evidence that Petitioners acted with actual malice. Pet. App.

26a-28a. Based on its independent review of the evidence, the trial court concluded that:

> [T]here is *no record evidence* that [Petitioners] acted with 'actual malice.' Plaintiff contends that David Welch, who created the advertisements but is not a defendant, 'should have known' the statements at issue were false. What Mr. Welch 'should have known' is irrelevant because negligence does not satisfy plaintiff's burden of proof. *Masson v. The New Yorker Magazine*, 501 U.S. 496, 510 (1991). Further, Mr. Welch testified at his deposition that he reviewed the legislative record and believed the advertisements were 'absolutely truthful.' Craig Engle, General Counsel of defendant National Republican Senatorial Committee, also stated in an Affidavit that he studied the advertisements, compared their statements with [Respondent's] votes, and approved them for publication only after he was satisfied that they were true. There is no genuine issue of material fact concerning 'actual malice.'

Pet App. 27a-28a (emphasis added). The trial court denied Respondent's motion for reconsideration. Pet. App. 29a.

The West Virginia Supreme Court reversed.[5] The sum and substance of the court's reasoning was as follows:

> [U]pon a review of the record . . . we conclude that there are genuine issues of material fact so as to necessitate the presentation of this case to a jury. Unlike the circuit court, we are not firmly convinced that the factual issues herein have been

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[5] Respondent's amended petition to appeal was granted on April 3, 2001. Pet. App. 30a.

> finally resolved. *Specifically, before this Court, the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were tainted with falsity or laced with malice.* When faced with such an *ongoing factual dispute*, and inferences that, if viewed in the nonmovant's favor [footnote], could support a verdict for the nonmovant, we must not continue to harbor these doubts as to whether summary judgment is appropriate but rather hand the case over to the jury, in whose province such factual determinations lie.

Pet. App. 15a (emphasis added). In stark contrast to the trial court's analysis, the West Virginia Supreme Court did not independently review the record and determine for itself whether Respondent had presented facts which, if true, constituted clear and convincing evidence of actual malice.[6] Indeed, the court did not identify a *single fact* from which a jury could find that Petitioners had acted with actual malice. The court did not mention Mr. Welch or Mr. Engle, discuss their testimony, or state the facts of which Mr. Welch and Mr. Engle were aware that could permit a jury to find, by clear and convincing evidence, that they acted with actual malice. The West Virginia Supreme Court simply summarily concluded that Respondent had met her summary judgment

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[6] In a concurring opinion, Justices Albright and Starcher reasoned that Respondent may prevail on a mere showing of negligence, Pet. App. 22a, a result that is inconsistent with well-settled precedents of this Court. *See* p. 19, *infra*.

burden because of the parties' "dispute" over "facts" that the court never identified. Pet. App. 15a, 20a-21a n.14.[7]

REASONS FOR ISSUING THE WRIT

A writ of certiorari should issue because the West Virginia Supreme Court bypassed two constitutional requirements in public figure defamation cases.

First, as this Court has consistently held, in public figure defamation cases, courts have a constitutional obligation to independently review the entire record to ensure that civil liability does not intrude "on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). This rule of "federal constitutional law" requires appellate courts to "make a fresh examination of crucial facts," especially in defamation cases premised on statements made during a political campaign. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686-87 (1989). Every federal Circuit Court of Appeals to address the question has concluded that the rule of independent review applies to appeals from a grant of summary judgment. The West Virginia Supreme Court ignored these precedents in failing to conduct an independent review of Respondent's "proof" that Petitioners acted with actual malice when they approved the advertisements for publication.

Second, this Court has consistently held that, under the First Amendment, a public figure cannot prevail in a

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[7] Three of the five Justices on the West Virginia Supreme Court campaigned with Respondent at the time that the advertisements at issue were aired on radio and television. Only one of the three recused, and he did so the day before oral argument. Pet. App. 32a-36a.

defamation action without proof by "clear and convincing evidence" that a defendant acted with "actual malice"—*i.e.*, publishing statements with knowledge that they were false, or with a reckless disregard for their truth or falsity. *New York Times Co.*, 376 U.S. at 279-80, 285-86. Eviscerating the clear and convincing evidence standard, the West Virginia Supreme Court handed the case to a jury simply because the parties disagreed over the facts, although the court did not identify the ostensibly relevant and disputed facts. An independent review of the record, however, confirms that a jury could not find actual malice by clear and convincing evidence. Respondent presented *no* evidence that Petitioners harbored any doubts about, or were aware of any fact that undermined, the truthfulness of the statements critical of Respondent's legislative voting record.

The rule of independent review and the requirement that public figure defamation plaintiffs prove actual malice by clear and convincing evidence are rules of federal constitutional law, and cannot be undermined by state-law summary judgment standards. Accordingly, review of the West Virginia Supreme Court's decision is warranted because that court "decided an important federal question that conflicts with relevant decisions of this Court," SUP. CT. R. 10(c), and "decided an important federal question in a way that conflicts with the decision of . . . a United States Court of Appeals." SUP. CT. R. 10(b).

However, briefing and argument on the merits are unnecessary. Because the West Virginia Supreme Court's decision is a "demonstrably erroneous application of federal law," summary reversal is appropriate. *See* SUP. CT. R. 16(1); *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (*per curiam*). Indeed, the hollowness of the West Virginia Supreme Court's discussion of the supposed factual dispute over actual malice makes this the prototypical case for summary reversal. *Major League Baseball Players Ass'n v.*

Garvey, 532 U.S. 504, 510 (2001) (*per curiam*) (summary reversal warranted where court "recited" the correct legal principles, "but its application of them [was] nothing short of baffling").

I. THE WEST VIRGINIA SUPREME COURT ABDICATED ITS CONSTITUTIONAL OBLIGATION TO REVIEW THE APPELLATE RECORD FOR CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE.

Beginning with *New York Times*, this Court has said that its "duty is not limited to the elaboration of constitutional principles," but also imposes an obligation to "review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co.*, 376 U.S. at 285. Public figures suing for defamation must prove by "clear and convincing evidence" that the alleged defamatory statements were "made with 'actual malice'—that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Id.* at 279-80, 285-86. Courts "must 'make an *independent* examination of the whole record,' [citation], so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 285 (emphasis added); *Bose Corp.*, 466 U.S. at 510-11.[8]

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[8] *Accord Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513-21 (1991); *Harte-Hanks*, 491 U.S. at 685-86; *Bose Corp.*, 466 U.S. at 499-511; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54-55 (1971) (*plurality opinion*); *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (*per curiam*); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-59 (1967) (*plurality opinion*).

When a lower court such as the one below intentionally ignores that obligation, error correction in the form of summary reversal from this Court is appropriate. This Court has held that the rule of independent review requires "enhanced appellate review," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), and "'is a rule of federal constitutional law.'" *Hurley*, 515 U.S. at 567 (*quoting Bose Corp.*, 466 U.S. at 510). Thus, "[t]he question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice *is a question of law*." *Harte-Hanks*, 491 U.S. at 685 (emphasis added); *accord Bose Corp.*, 466 U.S. at 510-11.

In defamation actions arising out of political campaigns, the rule of independent review assumes an even more critical role in preserving the "robust" and "wide-open" debate contemplated by the First Amendment. "'Discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established by our Constitution.'" *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (*quoting Roth v. United States*, 354 U.S. 476, 484 (1957)). Indeed, the First Amendment "has its *fullest and most urgent application* precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (emphasis added). "When a candidate enters the political arena, he or she 'must expect that the debate will sometimes be rough and personal.'" *Harte-Hanks*, 491 U.S. at 687 (*quoting Ollman v. Evans*, 752 F.2d 970, 1002 (D.C. Cir. 1984) (*en banc*) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985)).

"There is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the *strongest possible case* for application of the *New York Times* [actual malice] rule,' [citation], and the *strongest possible case for independent review*." *Harte-*

Hanks, 491 U.S. at 686-87 (emphasis added); *accord Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971). As this Court has recognized, "[t]he clash of reputations is the staple of election campaigns" because

> [t]he principal activity of a candidate in our political system . . . consists in putting before the voters every conceivable aspect of [her] public and private life that [s]he thinks may lead the electorate to gain a good impression of [her]. A candidate who, for example, seeks to further her cause through the prominent display of [her husband] and children can hardly argue that [her] qualities as a [wife] or [mother] remain of 'purely private' concern. And the candidate who vaunts [her] spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent . . . attempts to demonstrate the contrary.

Monitor Patriot, 401 U.S. at 274-75.

For these reasons, it is at this hour too late in the development of free political speech jurisprudence for a lower court to effectively call into question this Court's decision that "[t]he question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact." *Bose Corp.*, 466 U.S. at 511. All of the federal Circuit Courts of Appeals are also in agreement in following the clear indications from this Court that "[a]s an appellate court reviewing an order granting summary judgment, we must independently review the record to determine whether [the plaintiff] has forecast evidence sufficient to prove actual malice by clear and convincing evidence." *Carr v. Forbes, Inc.*, 259 F.3d 273,

282 (4th Cir. 2001) (*citing Bose Corp.*, 466 U.S. at 514).[9] In reviewing a grant of summary judgment in public figure defamation cases, an appellate court must satisfy itself that "the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986); *see also Carr*, 259 F.3d at 282-83; *Dunn*, 193 F.3d at 1197-98; *Dunn*, 833 F.2d at 450.

Here, the West Virginia Supreme Court failed even to acknowledge that it had a constitutional obligation to independently review the record and determine *for itself*, and as a matter of law, whether Respondent had presented clear and convincing evidence of actual malice. Instead, the court was satisfied that Respondent had presented such evidence simply because "the parties repeatedly and continuously have argued the facts giving rise to the instant appeal and whether the allegedly defamatory statements were . . . laced with

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[9] *Accord Desnick v. American Broadcasting Cos.*, 233 F.3d 514, 517-20 (7th Cir. 2000); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001); *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1197-1200 (11th Cir. 1999); *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1062-64 (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 410-12 (6th Cir. 1991); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1434 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 450 (3d Cir. 1987); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *Herbert v. Lando*, 781 F.2d 298, 308 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); *see also American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1247 (10th Cir.) (independently reviewing record on grant of summary judgment in First Amendment case), *cert. denied*, 531 U.S. 811 (2000).

malice." Pet. App. 15a. The West Virginia Supreme Court "hand[ed] the case over to a jury" based solely on *the parties' disagreement* about the absence of actual malice, rather than on *the court's independent determination* that specified evidence in the record allowed a jury to find actual malice by clear and convincing evidence. Such an abdication is simply contrary to the legion of precedents from this Court and other federal courts.

The West Virginia Supreme Court's bland assurance that it had "review[ed] . . . the record," Pet. App. 15a, does not satisfy the constitutional obligation of independent review. Acceptance of such passing statements would deprive the rule of its intended purpose—to ensure that "the evidence in the record is sufficient to cross the constitutional threshold [of] clear and convincing proof of 'actual malice.'" *Bose Corp.*, 466 U.S. at 511. Thus, the rule of independent review "oblige[s]" courts "to make a *fresh examination of crucial facts*." *Hurley*, 515 U.S. at 567 (emphasis added). In case after case, this Court has applied the rule of independent review by examining the evidence and determining anew whether actual malice can be established with convincing clarity.[10] In public figure defamation cases on appeal from a grant of summary judgment, the federal Circuit Courts of Appeals have applied the rule of independent review in precisely the same way.[11]

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[10] *See, e.g.*, *Masson*, 501 U.S. at 513-21; *Harte-Hanks*, 491 U.S. at 689-93; *Bose Corp.*, 466 U.S. at 511-14; *Rosenbloom*, 403 U.S. at 55-57; *Time, Inc.*, 401 U.S. at 284-92; *Greenbelt*, 398 U.S. at 11-14; *Beckley*, 389 U.S. at 82-85; *Curtis*, 388 U.S. at 156-59; *New York Times Co.*, 376 U.S. at 285-88.

[11] *See Carr*, 259 F.3d at 282-83; *Desnick*, 233 F.3d at 517-20; *Gray*, 221 F.3d at 248, 251-52; *Dunn*, 193 F.3d at 1197-1200; *Dodds*, 145 F.3d at 1061-64; *Perk*, 931 F.2d at 410-12; *Price*, 881 F.2d at 1434-

(continued...)

The West Virginia Supreme Court did not discuss *any* of the facts ostensibly comprising the "factual dispute" that authorized a jury to find actual malice by clear and convincing evidence. Pet. App. 15a, 20a-21a n.14. Although the court acknowledged that Respondent was subject to a "stricter standard of evidence" at the summary judgment stage in a public figure defamation action, *id.* (*citing Anderson*, 477 U.S. 242, *Crain v. Lightner*, 364 S.E.2d 778, 782 n.1 (W. Va. 1987), and *Long v. Egnor*, 346 S.E.2d 778, 785-86 (W. Va. 1986)), the court did not identify even a *single fact* proffered by Respondent that satisfied this "stricter standard of evidence."[12] Thus, the West Virginia Supreme Court's purported "review of the record" pays nothing more than lip service to the constitutional command to conduct a "fresh examination of crucial facts." *Hurley*, 515 U.S. at 567.

II. AN INDEPENDENT REVIEW OF THE RECORD CONFIRMS THAT THERE IS *NO* EVIDENCE—LET ALONE CLEAR AND CONVINCING EVIDENCE—FROM WHICH A JURY COULD FIND THAT PETITIONERS ACTED WITH ACTUAL MALICE.

The West Virginia Supreme Court's failure to independently review the record was not harmless error. An independent review only confirms the trial court's conclusion that "there is *no record evidence* that [Petitioners] acted with

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46; *Liberty Lobby, Inc.*, 852 F.2d at 598-601; *Dunn*, 833 F.2d at 450-55; *Zerangue*, 814 F.2d at 1071-72; *Herbert*, 781 F.2d at 308-11.

[12] Instead, the West Virginia Supreme Court offered mysterious references to unexplained "deposition testimony" and the trial court's ostensible decision to "discredit the evidence offered by [Respondent] to demonstrate the existence of a genuine issue of material fact." Pet. App. 16a n.10.

'actual malice.'" Pet. App. 27a (emphasis added). The demanding actual malice standard requires clear and convincing proof that Petitioners either knew that the advertisements were false, or that they acted with reckless disregard for the truth of those statements. *See New York Times Co.*, 376 U.S. at 279-80, 285-86; *Bose Corp.*, 466 U.S. at 512. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." *Harte-Hanks*, 491 U.S. at 688; *accord Masson*, 501 U.S. at 510. Instead, "[t]he standard is a *subjective one*—there must be sufficient evidence to permit the conclusion that the defendant *actually had a 'high degree of awareness of . . . probable falsity*'" or "'*in fact entertained serious doubts as to the truth of his publication.*'" *Harte-Hanks*, 491 U.S. at 688 (emphasis added) (*quoting St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) and *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

A. Respondent Presented *No* Evidence That Mr. Welch Acted With Actual Malice.

Respondent's effort to establish actual malice focused almost exclusively on the state of mind of Mr. Welch, the creator of the original draft of the advertisements. Mr. Welch testified that he believed the advertisements were "absolutely truthful" and that "[t]he objective of the ads was to convey to the voters of West Virginia accurate and truthful information about [Respondent's] public voting record." Welch Depo., at 36, 50, 88. The uncontested record evidence confirms the factual basis for Mr. Welch's testimony that he believed the statements in the advertisements were "absolutely truthful."[13]

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[13] As to each of the statements in the advertisement, Respondent argued that Petitioners acted with actual malice because then-candidate Underwood publicly stated that he objected to the "tone" of the advertisements and asked that the advertisements be withdrawn. *See* App. Br. at 25; Underwood Depo., at 10-11, 20. Underwood's testimony (continued...)

1. "In the State Senate, Charlotte Pritt proposed teaching first graders about condoms."

On March 20, 1989, Respondent sponsored Senate Bill 531 ("SB 531"), which provided:

> [T]he state board of education *shall* cause to be taught *in all of the public schools of this state the subject of human growth and development, including* the social aspects, *contraception*, diseases and all other special instruction deemed appropriate and necessary by the state board. The state board shall determine the necessary time of instruction of human growth and development which *shall be provided to grades kindergarten through twelve.*

W. VA. SENATE BILL 531, COMM. PRINT 89R1025 (Mar. 20, 1989) (emphasis added). Respondent argued that because the word "condoms" does not appear in SB 531, the statement that Respondent voted to "teach first graders about condoms" was "literally false" and a "fabrication." App. Br. at 23-31.

However, Mr. Welch testified that he believed that the statement, "Charlotte Pritt proposed teaching first graders

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does not suggest that Petitioners acted with actual malice. Respondent presented *no* evidence that Underwood ever informed Petitioners that the advertisements were false, or asked that the advertisements be withdrawn because they were false. In fact, it was undisputed that Underwood played no role whatsoever in the preparation of the advertisements, did not even know that Petitioner Victory Committee existed, and did not personally review Respondent's legislative voting record. *See* Underwood Depo., at 8, 20. Nor did Respondent present any evidence that Underwood provided Petitioners with any facts that would have put them on notice that any statements in the advertisements were ever ostensibly false.

about condoms," was a "fair interpretation" of SB 531 because condoms are a common form of contraception. *See* Welch Depo., at 39-40; *see* THE OXFORD DICTIONARY AND THESAURUS 291 (Am. ed. 1996) (defining "condom" as a "contraceptive"). A "reasonable" statement made in "good faith" establishes, as a matter of law, that the statement was not made with actual malice. *New York Times Co.*, 376 U.S. at 286; *see also Dunn*, 193 F.3d at 1197. Respondent offered no evidence that Mr. Welch's belief that condoms are a common form of contraception was held in bad faith.

Respondent's own interpretation of SB 531 simply confirms that Mr. Welch's interpretation of that bill was one of several reasonable interpretations. Respondent testified that it would be a "true" statement to say that SB 531 provided "*sex education* for children as young as first grade." Pritt Depo., Vol. I, at 231 (emphasis added). Respondent also agreed that the "State Board of Education would have had total authority to make the decision of whether to teach *contraception* at *any school level*." Pritt Depo., Vol. II, at 138 (emphasis added). Thus, Respondent's suggestion that she favors "sex education" for first graders, which includes instruction on "contraception" but not on condoms, is not materially different than Mr. Welch's interpretation that teaching first graders about contraception would include a discussion of condoms. *See Bose Corp.*, 466 U.S. at 512 (no actual malice where statement is "'one of a number of possible rational interpretations'" (*quoting Time, Inc.*, 401 U.S. at 290)).

2. "Senator Pritt also voted to permit the sale of pornographic videos to children."

On February 15, 1990, Respondent voted against an amendment to Senate Bill 184 ("SB 184"). *See* Pritt Depo., Vol. III, at 21. The amendment provided that:

> No business entity in this state shall offer for sale or rent or sell or rent to a person who is less than eighteen years of age, or permit a person who is less than eighteen years of age to view on the entity's premises, a video movie which is rated 'X' or which is not rated.

W. VA. J. OF THE SENATE 481-82 (Feb. 15, 1990). Respondent testified in her deposition that it is a false statement to say that she voted to permit selling pornographic videos to children because she did not "inten[d]" that result and because she believed that West Virginia law already prohibited the sale of pornographic videos to children. *See* Pritt Depo., Vol. III, at 19-20, 23, 29, 36; App. Br. at 24. However, Respondent presented no evidence suggesting that Mr. Welch was aware of Respondent's subjective intent when she voted on the amendment to SB 184 or was aware of any alleged West Virginia law that prohibited the sale of "X" rated videos to minors.

3. "She even voted to allow convicted drug abusers to work in our public schools."

On March 10, 1988, Respondent voted against an amendment to Senate Bill 639 ("SB 639"), which provided:

> [N]o person who has been convicted of a charge of possession, use or distribution of any illegal or controlled substance will be hired either by the state superintendent of schools or any county superintendent of schools for any administrative, professional or service personnel position.

W. VA. J. HOUSE OF DELEGATES 1624-25 (Mar. 10, 1988). Here, too, Respondent focused on her unannounced intent—ostensibly not to allow drug abusers to work in the public schools—and her belief that existing West Virginia law prohibited schools from hiring persons convicted of drug possession, use, or distribution. *See* Pritt Depo., Vol. II, at

146-49; App. Br. at 24. However, there was no evidence suggesting that Mr. Welch was aware either of Respondent's undisclosed state of mind in voting against the amendment to SB 639, or of other statutory provisions that Respondent allegedly considered in casting her vote.

4. "If parents can't trust Charlotte Pritt to protect our children, think also of our veterans."

Respondent argued that Mr. Welch drafted this statement with actual malice because she "had the reputation of being one of the foremost advocates for the protection of children when she was in the legislature." App. Br. at 24-25. However, Respondent presented no evidence that Mr. Welch was aware of Respondent's "reputation" in the West Virginia legislature.

Nor did Respondent present any evidence contradicting Mr. Welch's proffered basis for this statement in the radio advertisement. Mr. Welch lived and worked in West Virginia. *See* Welch Depo., at 73, 78. It was undisputed that, at the time that he drafted the radio advertisement, Mr. Welch had a child in the first grade. *Id.* at 40. Based solely on his status as a parent of a first grader, Mr. Welch believed that Respondent's voting record on teaching first graders about condoms, allowing children to purchase pornographic videos, and allowing drug abusers to work in public schools made her unfit to be governor of West Virginia. *Id.* at 40, 44-45; *see also id.* at 40 ("I would say that that's not the kind of voting record that I would want for someone to be the chief executive of the State that I live in."); *id.* ("So, as a parent and thinking about all of the parents in West Virginia, I certainly think that saying, ['']Parents can't trust Charlotte Pritt,['] [was] based upon her voting record on these particular pieces of legislation."). Because Mr. Welch based his opinion on disclosed facts, as a

matter of law, the statement could not have been made with actual malice.

5. "Charlotte Pritt voted against honoring the men and women of West Virginia who fought in the Gulf War."

A few days after the Gulf War began, the West Virginia State Senate adopted Concurrent Resolution 4 ("CR 4"). *See* W. VA. J. OF THE SENATE 150-51 (Jan. 24, 1991). That resolution offered the support of both Houses of the West Virginia legislature for the Gulf War and for West Virginia servicemen and women serving in the Gulf. The resolution in part provided:

> *Further Resolved*, That the West Virginia Legislature supports and so *honors all West Virginians serving America in Operating Desert Storm* including those West Virginia National Guard and Reserve Units activated for Operation Desert Storm. [¶] West Virginia's sons and daughters have a long and distinguished tradition of serving their country in times of military need, with traditionally one of the highest per capita rates of military service in the nation.

Id. (emphasis added). Respondent was one of only two Senators to vote against CR 4. *Id.*; Pritt Depo., Vol. III, at 86-89, 93. Mr. Welch therefore believed that the statement that Respondent voted against "honoring" the West Virginians who fought in the Gulf War was true.

Respondent argued that Mr. Welch acted with actual malice because he did not examine Respondent's entire voting record on "honoring" Gulf War veterans. App. Br. at 13; Welch Depo., at 47-50. Respondent stated that Welch ignored her vote to "honor" West Virginia servicemen and women who had served in the Gulf War by paying them a state-sponsored "bonus." App. Br., at 26. However,

Respondent presented no evidence that Mr. Welch misstated Respondent's voting record.[14] To the contrary, Mr. Welch testified that a "[v]oting record is the recorded votes that are public information [and] that are documented in the official legislative files with the West Virginia Legislature." Welch Depo., at 48. In Mr. Welch's view, "if you voted six times on something, one time is still part of your voting record. . . . A voting record is a voting record is a voting record. . . . [A] legislator must be held accountable for all of [her] votes" *Id.* at 48, 49, 50. Respondent presented no evidence that Mr. Welch did not in good faith draw this portion of the advertisement from his analysis of Respondent's vote on CR 4.

Ultimately, Respondent simply thought it was unfair to present her vote on CR 4 as evidence of her position on the issue of honoring Gulf War veterans. Discussion of voting records and their significance is a core part of electoral debate. Disagreement on the significance of a truthfully described legislative vote cannot support a jury finding of actual malice by clear and convincing evidence. *See Monitor Patriot*, 401 U.S. at 275 ("A community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it."); *St. Amant*, 390 U.S. at 731, 733 (failure to investigate insufficient evidence of actual malice).

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[14] In fact, Respondent herself conceded that she did not expect the statement in the advertisement to be qualified by the statement, "But [Respondent] voted for a bonus for West Virginia veterans after hostilities had ceased." Pritt Depo., Vol. III, at 117.

6. "Senator Pritt voted to allow the burning of the American Flag that all veterans fought so hard to defend."

On March 8, 1991, the West Virginia Senate adopted Senate Resolution 31 ("SR 31"), which "urged" the United States Congress to "propose and adopt an amendment to the Constitution of the United States preserving and protecting the flag of the United States from desecration." W. VA. J. OF THE SENATE 3 (Mar. 8, 1991). Because Respondent voted against SR 31, *see* Pritt Depo., Vol. III, at 96, Mr. Welch believed that this statement in the advertisement was true.

Here, again, Respondent referenced her alleged undisclosed intent not to "allow the burning of the American flag" because flag-burning is constitutionally protected speech and, therefore, there was no need to "open a new area of law." Pritt Depo., Vol. I, at 231-32; Pritt Depo., Vol. III, at 90-91, 94. Respondent offered no evidence suggesting that Mr. Welch was aware of Respondent's alleged subjective "intent" with respect to SR 31. Regardless, Respondent herself testified that it "would be accurate" to state that "Senator Pritt voted to preserve the right of Americans to burn the American flag." Pritt Depo., Vol. III, at 94. There simply is no intelligible difference between Respondent's statement that she "voted to preserve the right of Americans to burn the American flag," and Mr. Welch's statement that Respondent "voted to allow the burning of the American Flag." Thus, because the indisputably true statement is virtually identical to the allegedly false statement, Mr. Welch could not have acted with actual malice when he drafted the statement in the advertisement.

7. "She even opposed requiring students to begin their day with the Pledge of Allegiance."

On February 11, 1986, the West Virginia House of Delegates adopted House of Delegates Bill 1193 ("HB 1193"), which required "the pledge of allegiance to the United States flag in public schools at the start of every instructional day," and also required that "certain students be exempt therefrom." W. VA. J. HOUSE OF DELEGATES 545-46, 638, 665-67 (Feb. 11, 1986). Because Respondent voted against HB 1193, *id.*, Mr. Welch believed that this statement was true. In arguing the existence of actual malice, Respondent contended that she did not oppose reciting the Pledge of Allegiance *per se*, but instead voted against the bill because it exempted students but not teachers. *See* Pritt Depo., Vol. III, at 110-11. Respondent, however, presented no evidence that Mr. Welch was aware of the reasons why Respondent claims she voted against HB 1193.

B. Respondent Presented *No* Evidence That Mr. Engle Acted With Actual Malice.

Focusing solely on Mr. Welch, Respondent did not contradict the evidence of Mr. Engle, the general counsel of Petitioner NRSC, concerning the process by which he verified and approved the advertisements. It is well settled, however, that "the state of mind required for actual malice [has] to be brought home to the persons *in the [Petitioners'] organization having responsibility for the publication of the advertisement.*" *New York Times Co.*, 376 U.S. at 287 (emphasis added).[15] It is undisputed that only Mr. Engle—

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[15] *Accord Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Holbrook v. Harman Automotive, Inc.*, 58 F.3d 222, 225 (6th Cir. 1995); *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 477 (8th Cir. 1987), *cert. denied*, 485 U.S. 970 (1988); *Flotech, Inc. v. E.I. Du Pont de Nemours &* (continued...)

and not Mr. Welch—had the responsibility and authority to approve the advertisements for publication on behalf of Petitioners. Engle Aff. ¶ 5.[16] Mr. Welch submitted to Mr. Engle only initial drafts of those advertisements. *See* Welch Depo., at 30-33; Engle Aff. ¶ 1.

Mr. Engle testified: (1) the NRSC had a "policy" of "pre-publication review[] of all advertisements," Engle Aff. ¶ 2; (2) the reviews are intended to "verify and ensure the truthfulness and accuracy" of the advertisements, *Id.*; (3) the Office of General Counsel for the NRSC "conducted a review of the advertisements at issue ... several days before their initial publication date," *Id.*, ¶ 3; (4) he "was personally involved in verifying the truthfulness and factual accuracy of the[] advertisements on behalf of the NRSC and the Victory Committee," *Id.*; (5) he "compared the advertisements' discussion of [Respondent's] voting record as a West Virginia state legislator with her actual votes on the supporting legislation," *Id.*, ¶ 4; (6) he reviewed Respondent's votes on various House and Senate bills that were the basis for the statements in the advertisements, *Id.*, ¶¶ 4(a)-4(f); *see* pp. 20-27, *supra*; (7) he "read each piece of supporting legislation and bill summaries, and confirmed [Respondent's] votes, as they were recorded in the journals of the West Virginia House of Delegates and State Senate," *Id.*, ¶ 4; (8) he concluded that the "statements contained in the advertisements truthfully portrayed the legislation on which [Respondent] voted and her actual votes" and he approved them because they were "truthful and accurate,"

Co., 814 F.2d 775, 781 (1st Cir. 1987); *Waskow v. Associated Press*, 462 F.2d 1173, 1175 n.4 (D.C. Cir. 1972).

[16] Respondent did not identify any other person affiliated with Petitioners that had the authority to approve the advertisements and that would testify in these proceedings.

Id., ¶ 5; and, (9) he would not have approved the advertisements if he believed them to be "untrue or inaccurate." *Id.*, ¶ 6.

Mr. Welch corroborated this evidence, testifying that Mr. Engle was "adamant" and "very exacting about the veracity of the ads, and . . . intent upon making sure that [the ads] were truthful . . . ." Welch Depo., at 30, 33, 88; *see also id.* at 32 ("I just remember that there was just an absolute commitment to making sure that the information and the content of the ads were truthful."). For her part, however, Respondent neither took Mr. Engle's deposition nor proffered evidence from any other witness to show that Petitioners otherwise acted with actual malice.

C. Summary Reversal is Required to Preserve the Robust and Wide Open Speech that is Essential in Political Campaigns.

If not corrected, the West Virginia Supreme Court's decision hands candidates for public office a potent, post-election weapon to strike back at political opponents and their supporters: a defamation lawsuit. By ignoring the constitutional mandate of independent review, the West Virginia Supreme Court's decision impermissibly chills speech in what is perhaps the most important public debate in a democratic society—whether a candidate seeking public office is fit to govern. In the State of West Virginia, candidates and their supporters who criticize an opponent's legislative voting record now will do so upon pain of years of litigation and the prospect of a multi-million dollar jury verdict. No result could be more inconsistent with this Court's long-standing precedent that the First Amendment cannot survive when

> would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact

> true, because of doubt whether it can be proved in court or the fear of expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' [Citation]. The rule thus dampens the vigor and limits the variety of public debate.

New York Times Co., 376 U.S. at 279; *accord Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772-73 (1986); *Time, Inc.*, 401 U.S. at 290.

The invitation to sue one's political opponents and their supporters is made more attractive still if a public figure defamation case can be handed over to a jury based solely on the parties' disagreement about the facts—rather than the constitutionally required clear and convincing proof of actual malice. Pet. App. 15a. The West Virginia Supreme Court has permitted future candidates to sue on *any* campaign advertisement, so long as the plaintiff makes the self-serving assertion—as Respondent has done here—that the advertisement did not capture the undisclosed subjective "intent" behind the candidate's voting record. *See* pp. 20-27, *supra*. Dangerously, the West Virginia Supreme Court would place into the hands of a local jury—rather than the voters of a State—the ultimate decision of whether a candidate's legislative voting record makes that person fit for public office.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue summarily reversing the judgment of the West Virginia Supreme Court.

Respectfully submitted,

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